

## CHAPTER SEVEN

# Inheritance Unbound

## The Politics of Personal Law Reform in Pakistan and India



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### INTRODUCTION

This essay addresses the constitutional and political dimensions of formal legal change in Pakistan and India. The changes I address here have one chief characteristic. Above all, they involve a process of change with an explicitly 'religious' dimension: in effect, a process of changing ostensibly 'transcendent' or 'God-given' personal laws.

What are the constitutional and political conditions under which the content of such laws is made to change in Pakistan and India? What are the constitutional and political conditions that might intervene to stifle or restrict such change? Is it possible for ordinary legislators, in either country, to stand up and say, on any given day: 'Behold! Today the Laws of God have changed. Today we will write a new religious law?' This is, briefly stated, the question I address in the context of this essay.

I am particularly interested in the ways in which Pakistan's status as an 'Islamic' State (in effect, a State with a special constitutional commitment to the terms of Islamic law) might affect the process of religious-cum-legal change. Does the 'Islamic' status of Pakistan's Constitution constrain the process of (formal) legal change—with

specific reference to the substance of ostensibly 'religious' personal laws—in any way?

Those with an interest in such questions often view the substantive terms of Islamic law, and especially State-based Islamic laws associated with specific types of formal *constitutional* protection, as somehow unusually 'inflexible' or 'fixed' (both for reasons of 'sacredness' and for specific 'constitutional' reasons). In the context of this essay, however, I take a closer look at this perspective, focusing specifically on the dynamics of religious-cum-political debate, religious-cum-legal flexibility, and ultimately, formal (and substantive) legal *change*.

Of course, neither Pakistan nor India is, as it were, constitutionally 'French', requiring a strict exclusion of religion from the legal affairs of the State. Neither is constitutionally 'American', requiring either a Jeffersonian wall of separation between religion, religious law, and the State (absent in India), or a firm commitment to religious non-establishment (absent in Pakistan). Both seek to engage and, in some sense, actively incorporate (within the State itself) the specific terms of 'religious' personal law. Both have courts with the power to interpret and enforce ostensibly 'God-given' laws. In fact, the difference between them simply lies in the fact that, over time, Pakistan has incorporated an explicit commitment to move beyond the 'equal status' approach adopted by India (according to which, by law, each religious tradition is supposed to be treated equally within a framework tied to specific notions of 'public order' and 'morality') in favour of what might be described as a 'special status' approach (according to which the State is constitutionally obliged to *privilege* the specific injunctions of Islam).<sup>1</sup>

Key similarities and important differences notwithstanding, I will pose the same set of questions for both Pakistan and India: Is it possible for the Pakistani legislature, facing explicit 'special status' conditions, to stand up and say on any given day, 'Behold!?' Is it possible for the Indian legislature, facing its own very different set of conditions, to stand up and say, 'Rejoice! Today the Laws of God have changed!?'

<sup>1</sup> See in this volume, Chapter 8 (John H. Mansfield, 'Religious Freedom in India and Pakistan: The Matter of Conversion').

The answer to this question is interesting. It is interesting, because, notwithstanding several important differences in each country, the answer seemed to remain more or less exactly the same in both countries for nearly sixty years (1947–2005). In fact, at a basic *constitutional* level, both countries articulated a pattern in which the postcolonial legislature *was* empowered to stand up and say, ‘Behold!’. There was, in other words, no clearly enforceable constitutional proscription on such a proclamation in either country—a condition that remains in place even today.

At a specifically *political* level, however, both countries seemed to articulate a pattern in which this rather permissive constitutional position—by all accounts a position allowing almost unlimited space for reinterpretive religious-cum-legal reform—was taken up and put into practice only under very limited circumstances. In fact, the basic punchline of this essay lies in drawing attention to a *political* pattern in which this process of substantive religious-cum-legal reform was limited (in practice) to just two very specific contexts: first, a political context defined by military and/or non-military authoritarianism (for example, the military dictatorship of General Mohammad Ayub Khan in Pakistan or the Emergency led by Indira Gandhi in India); and, second, a political context defined by one-party dominant regimes in which the ruling party held, *on its own*, more than 60 per cent of the existing seats in the legislature.

Substantive religious-cum-legal reform, in other words, *is* constitutionally permitted in both countries. The terms of religious personal law are *not* (constitutionally) ‘immutable’. (As John Mansfield notes in Chapter 8 of this volume, States have had an important role to play when it comes to the definition of personal religious practice in both countries.) And, yet, having said this, the political conditions under which each State has pushed for reform are revealing. Change has occurred, almost exclusively, in a political climate defined by a certain ‘immunity’ from the terms of multi-party (or cross-party) bargaining. Indeed, only *unrivalled* political elites have tended to be, legislatively, in a position to stand up and ‘speak for God’.

Throughout, my focus is confined to just one area of religious-cum-legal reform: inheritance. In fact, the thrust of most debates regarding the general topic of inheritance, both in Pakistan and

in India, has typically involved a specific set of concerns regarding the extent to which ordinary legislators might be in a position to 'add' new heirs to what many regarded as an already 'existing' and ostensibly 'sacred' list.

In India, among Hindus, married women tend to be excluded from the list of heirs outlined in the sacred Hindu *shastras*. And, as a result, political actors have frequently disagreed about the extent to which women might be 'added' to that 'existing' list of heirs—not simply as a matter of local practice or custom but rather as a matter of substantive and enforceable law.

The debate has, however, been more nuanced among Muslims in Pakistan, because within the Holy Qur'an women are already included in the list of so-called 'Qur'anic' heirs.<sup>2</sup> (They actually dominate that list.<sup>3</sup>) Notwithstanding efforts to enforce that list (against enduring notions of agnatic or all-male 'tribal custom'), therefore, the question of reform has largely moved beyond the question of adding individual women in favour of a more specific set of questions regarding the possibility of 'adding' orphaned grandchildren. In Qur'anic terms, many scholars insist that these grandchildren are excluded from the process of inheritance within their families by the 'early' death of their parents. And, yet, some reformers have attempted to 'correct' this anomaly even *within* the *suras* (verses) of the Holy Qur'an.<sup>4</sup> In fact, in some cases, they have taken it upon themselves to 'add' orphaned grandchildren to the list of sacred heirs by law.<sup>5</sup>

<sup>2</sup> See, Lucy Carroll, 'The Hanafi Law of Intestate Succession: A Simplified Approach', *Modern Asian Studies*, (1983), 17(4): 629–70; and 'The Ithna Ashari Law of Intestate Succession: An Introduction to Shia Law Applicable in South Asia', *Modern Asian Studies*, (1985), 19(1): 85–124.

<sup>3</sup> See, for example, verses 4:11, 4:12, and 4:176. Marmaduke Pickthall, *The Meaning of the Glorious Qur'an* (Taj Company Ltd.: Karachi, 1971), pp. 74, 75, 98.

<sup>4</sup> For a discussion of the Qur'an, later commentaries on the subject of Islamic inheritance, and the relationship between these commentaries and later effort to 'correct' the status of orphaned grandchildren, see, N.J. Coulson, *Succession in the Muslim Family* (Cambridge University Press: Cambridge, 1971).

<sup>5</sup> See, N.J. Coulson, 'Islamic Family Law: Progress in Pakistan', in J.N.D. Anderson (ed.), *Changing Law in Developing Countries* (George Allen & Unwin: London, 1963), pp. 240–57; J.N.D. Anderson, 'Recent Reforms in the Islamic Law of Inheritance', *International and Comparative Law Quarterly*, (1965), Issue 14: 349–65; Lucy Carroll, 'Succession of Orphaned Grandchildren in Pakistan: Conflicting

The question concerns the extent to which these legislative reformers, both in Pakistan and in India, might be in a position, both constitutionally and politically, to advance the reforms they desire.<sup>6</sup> In fact, the question concerns the circumstances within which ordinary legislators have actually found themselves in a position to stand up and say, 'Behold! Henceforth daughters shall be treated as equal members of every Hindu coparcenary'. Or, 'Hark! Orphaned grandchildren will henceforth be entitled to a specific share of every ancestral estate'.

### THE POLITICS OF PERSONAL LAW REFORM IN PAKISTAN

Within the Islamic Republic of Pakistan one might expect the institutionalization of Islamic injunctions (within the Constitution) to introduce specific constraints on postcolonial patterns of independent legislative action. A special clause known as the Objectives Resolution (adopted in 1949 and added to the Constitution as a general preamble in 1956, before being elevated to the status of a substantive article—Article 2A—in 1985), for instance, states that 'the Muslims of Pakistan shall be enabled to order their lives in accordance with the fundamental principles and basic concepts of Islam'. In fact, further language embedded within the so-called directive principles goes on to note that specific steps, beginning with the establishment of a special institution known as the Council of Islamic Ideology, will be taken to ensure that (a) every law in Pakistan is brought into

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Judgments on the Method of Calculation', *Islamic and Comparative Law Quarterly*, (1984), 4: 247–50; and, finally, Lucy Carroll, 'Orphaned Grandchildren in Islamic Law of Succession: Reform and Islamization in Pakistan', *Islamic Law and Society*, (1998), 5(3): 420–36.

<sup>6</sup> Before the promulgation of the Muslim Family Laws Ordinance (MFLO) in 1961, colonial and postcolonial efforts to engage Islamic laws of inheritance within the territories that formed a part of Pakistan did not address the task of 'substantive' reform. More often than not they simply took the question of substance for granted and sought to extend or restrict its application. See for example, the West Punjab Muslim Personal Law (Shariat) Application Act, 1948, the Northwest Frontier Province Muslim Personal Law (Shariat) Application Act, 1950, the Punjab Muslim Personal Law (Shariat) Application (Amendment) Act, 1951, and so on. See also, with reference to India as a whole, the Muslim Personal Law (Shariat) Application Act, 1937.

conformity with 'the injunctions of Islam as laid down in the Holy Quran and Sunnah' and, moreover, that (b) 'no law [will] be... enacted which is repugnant to such injunctions'.

Having established this Council of Islamic Ideology, however, the Constitution goes on to limit its role quite severely, noting in Article 230, for instance, that the work of this Council will be confined to providing 'advice' and 'recommendations' to the President, the National Assembly, the Provincial Assemblies, and so on. In fact, when General Ayub Khan intervened to 'add' orphaned grandchildren to the list of existing Qur'anic heirs in 1961, building directly on the work of a special Commission on Marriage and Family Laws with the promulgation of a bold new ordinance known as the Muslim Family Laws Ordinance (MFLO), the Council of Islamic Ideology was powerless to stop him.<sup>7</sup> Indeed, the Constitution did not *constrain* the process of reform. It merely provided a framework for ongoing (reform-oriented) *advice*.<sup>8</sup>

<sup>7</sup> In its push for reform, the Commission explained that 'if a person leaves a great deal of property and his father pre-deceased him, the grandfather gets the share that the father of the deceased would have got', adding that, [if] the right of representation is recognised by Muslim law among the *ascendants*,...it does not... seem logical...that the right of representation should not be recognised among the lineal *descendants* as well (emphasis added). Quoted in Lucy Carroll, 'The Pakistan Federal Shariat Court, Section 4 of the Muslim Family Laws Ordinance, and the Orphaned Grandchild', *Islamic Law and Society*, (2002), 9(1): 72 (fn7). 'The Islamic law of inheritance', they argued, 'cannot be irrational and inequitable'. Quoted in Carroll, 'Orphaned Grandchildren', (1998), p. 409 (fn1). Carroll, however, finds this analogy to the right of representation among ascendants 'unconvincing', because, she notes, 'the father's father takes in the absence of the father, not because he represents the father, but because in the absence of the father he is the nearest male agnatic ascendant', p. 411 (fn10). For further criticism, see, A.B.M. Sultanul Alam Chowdhury, 'The Problem of Representation in the Muslim Law of Inheritance', *Islamic Studies*, (1964), 3: 375–91.

<sup>8</sup> According to N.J. Coulson, the 'arbitrary and specious reasoning' of the Commission on Marriage and Family Laws 'demonstrated only the most superficial familiarity with Islamic legal history'. In fact, he argues, 'it is not surprising... that their proposals were condemned by their traditionalist colleague [Maulana Ehtisham-ul-Haq Thanvi] as an unwarranted interference by laymen in the realm of sacred law'. See 'Islamic Family Law', p. 247. Lucy Carroll adds that 'the claim on the part of a seven-member Commission containing three female members and only one representative of the *ulema* of a right to exercise *ijtehad* [that is, independent religious-cum-legal reasoning] and the promulgation of many of

In 1973, Prime Minister Zulfikar Ali Bhutto promulgated an entirely new Constitution. But even then, the reforms introduced by General Ayub Khan remained firmly in place. The Constitution itself stated that Islam would be 'the State religion' (Article 2); but having said this, Bhutto ensured that the MFLO (1961) was carefully protected by a special constitutional provision known as the First Schedule.<sup>9</sup> In fact, he incorporated this First Schedule as a special ring-fence provision specifically to ensure that the MFLO would be shielded from any threat of malign judicial review—for example, on the grounds that its reform-oriented provisions regarding orphaned grandchildren were incompatible with 'a fundamental right' to some (countervailing) form of 'religious expression'. The constitutional status of Islam, in other words, was rendered explicit. But, even then, its reach did *not* extend to any *repeal* of existing religious-cum-legal 'reforms'.

General Zia-ul-Haq, for his part, launched his well-known 'Islamization' campaign with the construction of a parallel religious judiciary—first in conjunction with four so-called 'shariat benches' attached to each provincial High Court (1979) and then in conjunction with a new-fangled Federal Shariat Court (FSC) in Islamabad (1980).<sup>10</sup> Moving beyond the purely 'advisory' role of the Council of Islamic Ideology, these new courts, including the Shariat Appellate Bench of the Pakistan Supreme Court, were empowered to decide whether or not existing laws were in fact 'repugnant to the injunctions of Islam' and, if they were, to render them ineffective. But having

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[their] recommendations as law by a martial law administration possessing neither Islamic nor democratic credentials...did not commend themselves to all sections of society. The *ulema* were particularly and predictably outspoken in their dissent'. Carroll, 'Orphaned Grandchildren', p. 436. See also, Tanzil-ur-Rahman, 'Succession Under Muslim Family Laws Ordinance 1961', *Pakistan Law Digest*, (1982), pp. 99–113.

<sup>9</sup> The First Schedule of the 1973 Constitution listed every law protected from the terms of Article 8, which stated that laws found to be inconsistent with fundamental rights protections would be considered legally 'null and void'. (In fact, by adding the MFLO and some 50–60 other laws to this Schedule, the Constitution freed the MFLO from any challenge on the basis of allegations regarding specific fundamental rights violations—for example, the right to profess or practise one's own religion.)

<sup>10</sup> See, Presidential Order No. 3 of 1979 (7 February 1979) and Presidential Order No. 1 of 1980 (27 May 1980).

established this parallel judiciary, Zia (somewhat surprisingly) went on to limit its scope, once again restricting it to the review of any law *except* (a) the Constitution itself and (b) 'Muslim personal law'. Indeed, by 1980, Jeffrey A. Redding argues that some had begun to ponder what might be described as the 'limited limitations' of Pakistan's existing constitutional architecture, noting that '[a] crafty parliament (or military authority)' should be able to legislate 'free from [any] fear that the Federal Shariat Court might intervene' simply by 'including [the word] "Muslim"' in the title of its legislation.<sup>11</sup> (After all, any law identified as a 'Muslim personal law' seemed to avoid any risk of judicial review.)

Even the Federal Shariat Court was slow in challenging this view. In the case of *Farishta v. Federation of Pakistan* (1980), for instance, the Shariat Appellate Bench of the Supreme Court simply reiterated—with specific reference to inheritance—that the MFLO was, in fact, completely immune to any form of judicial review on the part of Pakistan's shariat courts, adding, from a purely constitutional perspective, that Muslim personal laws were supposed to be reviewed by the (powerless) Council of Islamic Ideology.<sup>12</sup>

Even after the Preamble to the Constitution (a.k.a. the Objectives Resolution) was elevated from its position as a non-binding preamble to the status of a substantive Article 2A by virtue of an executive ordinance in 1985, the Supreme Court intervened in the case of *Hakim Khan v. The State* (1992) to declare that Article 2A was not a

<sup>11</sup> Jeffrey A. Redding, 'Constitutionalizing Islam: Theory and Pakistan', *Virginia Journal of International Law*, (2004), 44(759): 775.

<sup>12</sup> In *Farishta*, the Shariat Appellate Bench of the Supreme Court dismissed a decision rendered by the Shariat Bench of the Peshawar High Court. Agreeing with the government—the government of Zia-ul-Haq—the Court declared that, as per Article 203(b), the MFLO was *not* subject to the scrutiny of the Federal Shariat Court. In particular, the Court noted that Article 203(b) was designed to ensure that the jurisdiction of the FSC was limited to the review of 'ordinary' legislation (applying to all citizens) rather than any 'special' legislation known as Muslim personal law (applying only to Muslims). This 'Muslim-only' legislation would continue to be referred to the Council of Islamic Ideology. See, *Massamat Farishta v. Federation of Pakistan*, *Pakistan Law Digest*, (1980), Peshawar 47 (Shariat). See also, Lucy Carroll, 'Nizam-e-Islam: Processes and Conflicts in Pakistan's Programme of Islamisation, with Special Reference to the Position of Women', *Journal of Commonwealth and Comparative Politics*, (1982), 20: 57–95.



‘supra-constitutional’ provision that could be used to invalidate other (ostensibly un-Islamic) parts of the Constitution itself (for example, the Constitution’s First Schedule).<sup>13</sup> And in *Kaneez Fatima v. Wali Mohammad* (1993), the Court returned to the same issue, noting that although Article 2A *could* be used to challenge the constitutional validity of an ‘executive ordinance’, it could *not* be used to strike down (a) other parts of the Constitution itself (following *Hakim Khan*) or, for that matter, (b) common pieces of routine legislation.<sup>14</sup> Indeed, following in the wake of *Kaneez Fatima* many came to believe that the courts were not in a position to import ‘the principles of Islam’ at all except to cater for special situations ‘untended by express legislation’.<sup>15</sup>

Throughout the latter half of the twentieth century, in other words, the Federal Shariat Courts took up several cases designed to clarify the limits of the ‘reformist’ domain. But legally speaking, few limits emerged. In fact, a closer reading suggests that it was not the legislature’s powers but its own that the Court was keen to check.

Finally, however, in the case of *Dr Mahmood-ur-Rahman Faisal v. Government of Pakistan* (1994), this pattern appeared to shift.<sup>16</sup> Stepping in to clarify the extent to which the terms of Muslim personal law were in fact ‘excluded’ from the possibility of review by the Federal Shariat Court, the Shariat Appellate Bench of the Pakistan Supreme Court explained that this ‘exclusion’ should not be taken to include the terms of Muslim personal law ‘as a whole’ (that is, Muslim personal law as it was said to apply to all Muslims in Pakistan). Instead, the Court declared, this exclusion was strictly limited to provisions that applied to a particular *sect* of Muslims. Only sectarian provisions, in other words, were ‘excluded’ from FSC-based patterns of religious-cum-legal ‘review’.<sup>17</sup> (Of course,

<sup>13</sup> See, *Hakim Khan v. The State*, PLD, (1992) SC 585; see also, *The State v. Zia-ur-Rahman*, PLD, (1973) SC 49.

<sup>14</sup> See, *Kaneez Fatima v. Wali Mohammad*, PLD, (1993) SC 905.

<sup>15</sup> Salman Akram Raja, ‘Islamisation of Laws in Pakistan’, *South Asian Journal*, (2003), 2.

<sup>16</sup> See, *Dr Mahmood-ur-Rahman Faisal v. Government of Pakistan*, PLD, (1994) SC 507.

<sup>17</sup> Article 227 (pertaining to the Council of Islamic Ideology) was later amended to ensure that, in evaluating existing and proposed laws for repugnancy

*Dr Mahmood-ur-Rahman Faisal* did not intend to shield the MFLO from additional FSC-based scrutiny; but, with a few 'sectarian' adjustments, it could have done so very easily.<sup>18</sup> After all, Islamic laws of inheritance *are* routinely applied in 'sect-specific' ways<sup>19</sup>).

Precisely insofar as the MFLO was not seen as a 'sect-specific' law. However, it was in fact reviewed (as a law applying to 'all of the Muslims in Pakistan') in the famous case of *Allah Rakha v. Pakistan* (2000).<sup>20</sup> This case was a landmark. In fact, the Federal Shariat Court hastened to reject the inheritance provisions of the MFLO (Section 4) outright, arguing that, from a purely religious perspective, the ancestral share provided to orphaned grandchildren was simply 'un-Islamic'. Having said this, however, the Court did not go on to declare what the terms of Islamic law should be; instead it opted to leave this matter to the legislature, referring, by way of example, to the Egyptian Law of Bequests.<sup>21</sup> Indeed, it explained that

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problems vis-à-vis the Qur'an and the Sunnah, the Council would define the terms 'Qur'an' and 'Sunnah' to mean 'the Qur'an and Sunnah as interpreted by [each] sect'. See, Presidential Order No. 14 of 1980 (18 September 1980). (Even here, however, the work of the Council was limited to the provision of non-binding advice.) For an extension of this point, see also, *Dr Amanat Ali v. Federation of Pakistan* (1983).

<sup>18</sup> 'Considering that intra-sect mobilization is...easier than pan-Muslim mobilization', notes Jeff Redding, 'the legislation of sectarian or communitarian law could eventually become more common than other forms of "Islamic" legislation'. And, 'if sectarian law proliferates', he notes, 'it is entirely possible the Shariat judicial system, as a result of its 1994 opinion, will encounter a future reduction in its jurisdiction....' Redding, 'Constitutionalizing Islam', p. 785.

<sup>19</sup> See, Lucy Carroll, 'The Hanafi Law'; Ibid., 'The Ithna Ashari Law'.

<sup>20</sup> See, *Allah Rakha v. The Federation of Pakistan*, PLD, (2000) FSC 1.

<sup>21</sup> In light of the fact that 'certain shares had been fixed by the Qur'an and therefore could not be modified', notes Fazlur Rahman, 'Egypt felt unable to assign a share of direct inheritance to the orphaned grandchildren and had recourse to the principle of mandatory will'. This principle was related to an injunction (2:180) encouraging wills that many jurists treated as 'abrogated' by the subsequent introduction of fixed shares. But in Egypt—and after 2000, in Pakistan as well—the 'mandatory will' appeared to be the preferred avenue of compromise between Qur'anic shares and contemporary notions of justice. Still, objections persisted. As Rahman explains, 'the Egyptian law...prescribes an inheritance share which is only veiled as mandatory will, since (1) the law, even if the propositus has made no will, presumes a will nevertheless, and (2) for the purpose of [measuring]...the amount to be given to the orphaned grandchild the share of the dead father "if he were alive"

the government of Pakistan should not be so bold as to 'add' any new Qur'anic heirs, for example, by way of an 'executive ordinance'; instead, the ruling party should simply be encouraged to follow in the footsteps of Egypt, Syria, Morocco, Kuwait, Jordan, Iraq, and many others, introducing an ordinary piece of legislation assuming the existence of a mandatory will to accomplish more or less exactly the same thing.<sup>22</sup>

Of course, many continued to insist that the terms of Muslim personal law were, somehow, fixed.<sup>23</sup> But over time, the judicial record itself expressed a very different story. In fact, by the time the Court announced its famous *Allah Rakha* decision, the record was perfectly clear—a record of substantive religious-cum-legal reform promulgated by a military dictator, protected by an elected prime minister, reinforced by a second military dictator, and then supported by a vast array of superior religious and constitutional courts. Clearly, the terms of religious-cum-legal 'reform' were not inconceivable. In fact, the terms of 'reform' were already very well entrenched.<sup>24</sup>

The conditions within which 'reform' was possible, however, were not determined (at least not exclusively) by the courts. More often

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is [still] kept as a necessary point of reference'. See, Fazlur Rahman, 'A Survey of Modernization of Muslim Family Law', *International Journal of Middle East Studies*, (1980), 11(4): 464. Indeed, Lucy Carroll goes on to note that 'it would be difficult to contend that [the 'obligatory bequest'] is founded in the Qur'an and the Sunnah of the Prophet—as these have been traditionally interpreted for many centuries past'. Carroll, 'Orphaned Grandchildren', (1998), p. 445.

<sup>22</sup> See, Egypt (1946), Syria (1953), Morocco (1958), Kuwait (1971), Jordan (1976), and Iraq (1979). Additional strategies of a similar sort—mostly pertaining to those who might wish to privilege certain heirs—were outlined by Lucy Carroll in her article, 'Life Interests and the Inter-Generational Transfer of Property: Avoiding the Law of Succession', *Islamic Law and Society*, (2001), 8(2): 245–86.

<sup>23</sup> See, Matthew J. Nelson, *In the Shadow of Shari'ah: Islam, Islamic Law, and Democracy in Pakistan* (Columbia University Press: New York, 2010).

<sup>24</sup> For a comparative dimension, see, John R. Bowen, *Islam, Law, and Equality in Indonesia: An Anthropology of Public Reasoning* (Cambridge University Press: Cambridge, 2003) and 'Qur'an, Justice, Gender: Internal Debates in Indonesian Islamic Jurisprudence', *History of Religions*, 38(1): 68–70, 72–8; Michael G. Peletz, *Islamic Modern: Religious Courts and Cultural Politics in Malaysia* (Princeton University Press: Princeton, 2002); and Mounira Charrad, *States and Women's Rights: The Making of Postcolonial Tunisia, Algeria, and Morocco* (University of California Press: Berkeley, 2002).

than not these conditions were tied to the content of local politics, with fragile coalitions remaining considerably more reserved than postcolonial dictators and one-party dominant regimes.

Looking back, for instance, we see that fragile coalition governments were often keen on extending the 'rhetoric' of Muslim personal law (for example, as a way to win political points) without, in any way, seeking to engage the rather more difficult task of 'substantive' religious-cum-legal reform: consider, for example, with respect to inheritance, specific efforts to extend the *application* of 'existing' shares for women—over and above, say, the prevailing terms of persistent 'tribal' customs (1948, 1950, 1951, and so on).

Following the military coup led by General Ayub Khan in 1958, however, we see something else entirely—something more 'substantive'. Again, the MFLO (1961) did not confine itself to the application of already 'existing' shares. Instead it completely *redefined* those shares. And of course it did so in the context of an almost untouchable (indeed an explicitly dictatorial) 'modernizing' postcolonial regime.<sup>25</sup>

Prime Minister Zulfikar Ali Bhutto (1970–7) did not attempt to introduce any 'substantive' religious-cum-legal reforms, with one (possible) exception. This exception concerned his support for a special constitutional amendment (Article 260) excommunicating Pakistan's beleaguered Ahmedi minority. Yet even here it is essential to point out that, when this constitutional amendment was introduced in 1974, Bhutto's party—the Pakistan People's Party—did not hold more than 60 per cent of the existing seats in the legislature; in fact, they held only 59 per cent of those seats (a figure that amounted to nine times more seats than its nearest political competitor—the Pakistan Muslim League or Qayyum). Indeed, even if the promulgation of Article 260 *is* taken to represent a case of 'substantive' religious-cum-legal reform, it would not undermine the basic terms of my argument—an argument regarding the importance

<sup>25</sup> It is worth pointing out that in some ways Ayub Khan's promulgation of the MFLO was doubly untouchable owing to the existence of a Provisional Constitutional Order (PCO) creating vulnerable and compliant judges.

of political context and, especially, the value of a certain immunity from the exigencies of cross-party 'bargaining'.

The same pattern clearly re-emerged when General Zia-ul-Haq introduced his famous 'Islamization' campaign in 1979—a campaign characterized by a wide range of 'substantive' religious-cum-legal reforms concerning, for instance, marriage, divorce, taxation, rape, and the rules governing evidence in court. Again, each and every one of these reforms was promulgated by 'executive decree'. None emerged, by way of ordinary 'legislation', following the introduction of a (nominally elected) Parliament—that is, a nominally elected 'coalition' government—in the spring of 1985.

Again, the postcolonial history is clear. Although the terms of Muslim personal law were not closed off from the specific terms of reform (constitutionally), they were for the most part strictly set apart from any environment characterized by fragile 'coalition' governments. Whenever change has occurred, it has occurred in a context defined by (or akin to) 'dictatorship'.

The 1991 elections provided Prime Minister Nawaz Sharif with an absolute majority in the Pakistan National Assembly (51 per cent), and, shortly thereafter, Sharif introduced a bill known as the Enforcement of Shariat Bill. Given the size of Sharif's majority, however, this Bill did not involve any effort to amend the 'substance' of existing religious personal laws; instead, it simply aimed to extend the 'rhetoric' of those laws in a rather transparent bid to garner political support.<sup>26</sup> In fact, the extent of its (substantive) irrelevance was revealed in the mechanics of its final vote: among the religious parties in the National Assembly none rose to support (or oppose) the Bill; all of them simply abstained.

Six years later, however, in 1997, Sharif returned to power with a much larger majority (63 per cent), leading many to believe that he might take up the task of 'substantive' religious-cum-legal reform with somewhat greater vigour. But in the event he did not. Instead, he

<sup>26</sup> In the end this Enforcement of Shari'ah Act (1991) was passed by just 40 votes to 3. See, Christine Amjad Ali and Charles Amjad Ali, *The Legislative History of the Shariah Act* (Christian Study Centre: Rawalpindi, 1992). See also, Charles H. Kennedy, 'Repugnancy to Islam: Who Decides? Islam and Legal Reform in Pakistan', *The International and Comparative Law Quarterly*, (1992), 41(4): 769–87.

simply opted to pursue a constitutional amendment defining a more limited role for the army and, in the Fall of 1999, he was removed from power—this time in a military coup.<sup>27</sup>

Like General Ayub Khan and General Zia-ul-Haq before him, General Pervez Musharraf (1999–2008) seized upon the protections afforded by his own military ‘dictatorship’ to revisit the path of ‘substantive’ religious-cum-legal reform. In fact, Musharraf sought to amend the so-called Hudood Ordinances initially promulgated by General Zia-ul-Haq with an entirely new law known as the Protection of Women (Criminal Laws Amendment) Act (2006).<sup>28</sup> Separating ‘religious’ injunctions regarding ‘adultery’ from the language of ‘rape’ and placing any prosecution for the latter strictly within the (mundane) terms of Pakistan’s existing criminal code, Musharraf’s reforms were strongly opposed by an amalgam of religious parties known as the Muttahida Majlis-e-Amal (MMA) (although, in its purely ‘advisory’ capacity, the Council of Islamic Ideology supported them). In fact, the ruling party within Musharraf’s own coalition (a party known as the Pakistan Muslim League-Quaid-e-Azam or PML-Q) actually joined the MMA in resisting this push for reform, forcing Musharraf to rely on several different ‘opposition’ parties to see his new law through. Indeed, without Musharraf, many noted that the prospects for reform were bleak. The support of a dictator was decisive.

Again and again, throughout the latter half of the twentieth century, the task of reform has fallen more or less exclusively to so-called ‘progressive’ dictators like General Pervez Musharraf in a tit-for-tat competition with ostensibly ‘conservative’ or ‘reactionary’

<sup>27</sup> See, Babar Sattar, ‘Pakistan: Return to Praetorianism’, in Muthiah Alagappa (ed.), *Coercion and Governance: The Declining Political Role of the Military in Asia* (Stanford University Press: Stanford, 2001), pp. 385–412.

<sup>28</sup> Notwithstanding the demands of many human rights organizations, the Protection of Women (Criminal Laws Amendment) Act, 2006 did *not* repeal Zia’s Hudood Ordinances. Instead, it retained the jurisdiction of this ordinance vis-à-vis the ostensibly ‘religious’ crime of ‘adultery’ (while, at the same time, making adultery a ‘bailable offense’ and abolishing both the death penalty and flogging for anyone who might be convicted).

Many religious scholars opposed these changes, arguing that every case of (consensual or non-consensual) ‘extra-marital sexual intercourse’ (including rape) should be treated in the same (‘religious’) terms.

dictators like General Zia-ul-Haq—both sides seeking to define and then, in due course, redefine the legal ‘substance’ of Islam. Clearly, the terms of Islamic law have not been closed off from the task of ‘substantive’ religious-cum-legal reform. But again, the conditions surrounding these reforms have remained quite far removed from the fragile coalition governments of the late 1940s, the early 1950s, the late 1980s, the early 1990s, and today. When change has occurred, it has occurred in a context defined by the benefits of bargaining ‘immunity’. Only the ‘immunized’, it seems, are prepared to stand up and say, ‘Behold!’

### THE POLITICS OF PERSONAL LAW REFORM IN INDIA

The situation in India is, perhaps surprisingly, almost exactly the same. In fact, ‘equal status’ (secular) forms of constitutionalism notwithstanding (see John H. Mansfield, Chapter 5 in this volume), the only difference seems to lie in a basic tendency to replace the reform-oriented work of military authoritarian leaders like General Ayub Khan, General Zia-ul-Haq, or General Pervez Musharraf with the work of non-military authoritarian leaders and the leaders of one-party dominant regimes in which the ruling party enjoys a single-party majority of at least 60 per cent in the lower house of the legislature (that is, the Lok Sabha). The key to success for those with an interest in ‘substantive’ patterns of personal law reform, in other words, still flows from an ability to construct a political environment that is, for all intents and purposes, ‘immune’ to the inconveniences associated with cross-party legislative bargaining. (In his essay, Mansfield does not address this effort to redefine the substance of religious personal laws; instead, he considers cases in which individuals convert from one religion and, thus, one religious personal law to another.)

From a strictly constitutional perspective the terms of Indian secularism are remarkably ambivalent when it comes to the problem of ‘substantive’ religious-cum-legal reform. It could be that the Constitution’s ‘equal status’ provisions amount to a recipe for equal-status safeguarding—that is, in some sense, a constitutional commitment to ensure that each religious tradition is ‘equally protected’ from the vagaries of State-based interference. But, of course, it could also be that India’s ‘equal status’ provisions amount to a recipe for

equivalent forms of (legislative or judicial) vulnerability; indeed, it may be that, together, the Indian Lok Sabha and the Indian Supreme Court are (constitutionally) responsible for bringing each tradition (including each tradition of religious personal law) into conformity with other constitutional norms—for example, the norm of gender equality (Articles 14 and 15).

Within the Indian Constitution, this impulse for equal-opportunity 'reform' is particularly evident within the so-called directive principles outlined in Articles 36–51 (including Article 44, which urges the State to reconcile its many different personal laws within what is commonly known as a 'uniform' civil code). Having said this, however, it is also clear that the special function of these directive principles is not at all unlike that of the directive principles we encountered in the case of Pakistan's Council of Islamic Ideology: on the one hand, 'directive principles' designed to promote a particular trajectory of reform (and thus, a particular 'constraint' on independent legislative action); and yet, on the other hand, a set of 'principles' that are themselves strictly 'advisory' (amounting to no immediately enforceable constitutional 'constraint' at all).

In India, just as much as Pakistan, those with an interest in the reform of religious personal law, and, especially, religious personal laws regarding inheritance, tend to confront specific questions regarding the extent to which new heirs might be 'added' to an already existing (and ostensibly sacred) list. Within the Mitakshara School of Hindu law traditionally prevailing in most parts of India (except Bengal), for instance, women are not regarded as full-fledged 'heirs'. In fact, within the Mitakshara School of law, their relationship with the ancestral property of their deceased male relatives is not defined by any specific form of 'ownership' rights at all; instead, it is defined by what is commonly known as a 'limited' lifetime estate—that is, an estate in which surviving widows, daughters, mothers, paternal grandmothers, and so on enjoy what is usually described as 'a usufructuary right of maintenance' until (a) their marriage or (b) their death. (With respect to an ancestral home or a piece of ancestral land, for example, these women will be 'maintained' either directly or via certain types of rental income; they will not be entitled to sell the land, or exchange it, or simply give it away.) In fact, among



Hindus in India, the challenge for would-be reformers typically lies in seeking to 'add' women to the list of those enjoying full-fledged legal 'ownership' rights to every 'ancestral' estate.<sup>29</sup>

Beginning in 1940 and then continuing after the independence of India in August 1947, the disinheritance of women was taken up with considerable vigour by a special committee known as the Hindu Law Committee.<sup>30</sup> The work of this committee was bitterly opposed by those who considered the existing terms of Hindu law to be utterly 'sacred' and, therefore, legally 'untouchable'. (As Reba Som explains, the members of this committee were plagued by 'a recurrent cry...that the Hindu *shastras* were hallowed by tradition', and, thus, that 'any attempt to tamper with them [would be] presumptuous

<sup>29</sup> The Hindu Law of Inheritance (Amendment) Act (1929) opened up colonial notions of Hindu law for reform. In particular, it declared that, in cases where a Hindu man died without any sons (or a surviving father), the right to inherit various forms of property *not associated with the Hindu coparcenary* (that is, the traditional body of 'agnatic' Hindu heirs) would include son's daughters, daughter's daughters, sisters, and sister's sons in preference to the man's surviving brothers. This adjustment did not affect the list of existing 'coparcenary' heirs; it simply elevated the Madras School of Mitakshara Hindu Law to the status of a national norm with respect to every other form of (non-coparcenary) property. In 1937, the British colonial State introduced a new law known as the Hindu Women's Right to Property Act (The Deshmukh Act), which aimed to provide Hindu widows with usufructuary access to a portion of the joint family estate once held by their deceased husbands—a portion equal to that inherited by each of her agnatic coparcenary sons. (Legally speaking, however, these women were not 'added' to the list of sacred heirs as full-fledged 'owners'. They were simply 'maintained' by a tiny portion of the 'share' once held by their husbands. And, alas, daughters were ignored altogether.)

<sup>30</sup> The authors of the first Hindu Law Committee report (1941) noted that 'Hindu law had kept in step with the requirements of society because of the efforts of the *smṛtikāras*', that is, the authors of the *smṛtis*, as well as various 'commentators'. But, insofar as 'such traditional authorities no longer existed', they noted that 'legislatures and the courts...[had a] responsibility [for] reinterpreting Hindu law to make it conform with the changed times'. See, Archana Parashar, *Women and Family Law Reform in India: Uniform Civil Code and Gender Equality* (Sage: New Delhi, 1992), p. 90. Still, Parashar explains that the members of this first Hindu Law Committee 'did not rely on the rules of interpretation...employed by [ancient] commentators. ... Instead they justified their proposals with a selective reliance on textual authority and...a recognition of changed conditions', always claiming to reflect 'the true intention of the *smṛtis*' (p. 92); see also, pp. 98–101.

and undesirable').<sup>31</sup> But in due course this committee succeeded in putting forward a host of rather dramatic (and 'substantive') religious-cum-legal reforms.

Even after these reforms were tabled in 1948, they languished in the capital for more than eight years.<sup>32</sup> In fact, even after one of their chief architects, Constituent Assembly Chairman B.R. Ambedkar, unveiled India's new Constitution in 1950—a Constitution that left considerable room for such reforms—it was not until Prime Minister Jawaharlal Nehru emerged from India's first general elections in 1952 with a single-party majority amounting to 74 per cent of the existing Lok Sabha seats that the climate began to shift.<sup>33</sup>

In her account of this rather dramatic legal-cum-political development, Archana Parashar explains that within India, 'it was widely believed that, because...Congress [had] won the first general elections [with such a huge majority] it had acquired the mandate of the population for Hindu law reform'.<sup>34</sup> In fact, she notes, it was almost as if Nehru himself had secured the mantle of divine inspiration, announcing in the Hindu Succession Act, 1956—one of the four new Acts that came together to form India's 'reformed' Hindu Code—that, thenceforth, both Hindu sons and Hindu daughters

<sup>31</sup> Reba Som, 'Jawaharlal Nehru and the Hindu Code: A Victory of Symbol over Substance?', *Modern Asian Studies*, (1994), 28(1): 174.

<sup>32</sup> According to Archana Parashar, the 'reform of Hindu law was not taken up in response to public demand'. On the contrary, 'the State assumed...responsibility for reform on its own initiative' (p. 81). In fact, 'the authors of the second Hindu Law Committee [report] overtly assumed that the legislature had the right to decide what changes were needed...and when' (p. 85).

<sup>33</sup> Quoting Lok Sabha member R.K. Chahdhuri, Reba Som argues, 'without [Nehru], the [Hindu Succession Act]...would not have been passed at all' (p. 193).

<sup>34</sup> Parashar, *Women and Family Law Reform in India*, p. 88. See also, Som, 'Jawaharlal Nehru and the Hindu Code', p. 185. As Parashar points out, 'it is difficult to accept that at the time of first introducing the bills [in 1948] the government was not sure of its capacity to carry through some of the reform measures but succeeded in actually enacting them into law [only] after these proposals had been altered and made [even] more radical by the Joint Committee or by the Rajya Sabha' (for example, by including those governed by Mitakshara law within the ambit of the new legislation, despite earlier efforts to exclude this group) (p. 111). Clearly, the confidence needed to enact these reforms was delivered by the general election and, more specifically, Parashar explains, by the overwhelming size of the Congress Party majority.

would be entitled to an equal portion of the share ('ownership') once held by their deceased Hindu father.<sup>35</sup> Indeed, Nehru went even further, declaring that, for the first time ever, Hindu 'owners' would be entitled to create a will—a will that could of course be used to shift this new share for 'daughters' in favour of specific 'brothers'.<sup>36</sup>

Of course, the reach of this rather sweeping reform initiative was limited, particularly with respect to the all-important question of agricultural land, by the fact that the Indian Constitution continued to describe matters pertaining to land as a 'provincial' or 'state-level' subject. (See, for example, the so-called 'Concurrent List' outlined in the Seventh Schedule of the Indian Constitution.) But, even then, several states simply opted to repeat the experience first initiated in Delhi, using their own rather enormous state-level majorities to push Nehru's agenda forward.

In 1975, for instance, the Congress-led 'Ruling Front Alliance' in Kerala added the political immunities associated with Indira Gandhi's Emergency to its own overwhelming legislative majority—a majority amounting to 63 per cent of the seats in the Kerala State Assembly—to eradicate the persistence of any agnatic (all-male) 'Hindu coparcenary estates'.<sup>37</sup> Ten years later, the newly formed Telugu Desam Party in Andhra Pradesh used its powerful 69 per cent majority in the Andhra State Assembly to ensure that women throughout Andhra Pradesh

<sup>35</sup> Although the Act abolished the concept of a 'limited' lifetime estate, seeking to provide 'equal' rights for both sons and daughters in the property of their deceased father, the Act did not seek to eliminate the concept of an agnatic (all-male) 'coparcenary'. To illustrate: A father with three sons and a daughter would leave 1/4th to each son, as members of the agnatic coparcenary, with the final 1/4th—the father's own share—being divided into four 'equal' parts, including one part for each son and one part for the remaining daughter; each son =  $1/4 + 1/16 = 15/16$ ; daughter =  $1/16$ .

<sup>36</sup> 'While the predominant effort was to justify [these] changes as being in consonance with the religious texts,' Parashar notes, '*there was [really] no suggestion that the dharmasastras could not be modified by the legislature*' (emphasis added) (p. 96). See also, A. Gledhill, 'Constitutional and Legislative Development in the Indian Republic', *Bulletin of the School of Oriental and African Studies*, (1957), 20(1/3): 276; and Lucy Carroll, 'Daughter's Right of Inheritance in India: A Perspective on the Problem of Dowry', *Modern Asian Studies*, (1991), 25(4): 791–809.

<sup>37</sup> Because the tenure of Kerala's Ruling Front Alliance was extended three times during the Emergency, it remained in place when the Kerala Joint Hindu Family System (Abolition) Act, 1975 came into force on 1 December 1976.

would be treated as 'full' members of every Hindu 'coparcenary'.<sup>38</sup> Indeed, what set these moments of 'substantive' reform apart was not the political 'platform' of the ruling party ('national', 'regional', etc); what set them apart was the strength of the ruling party's majority.

In 1989, the Dravida Munnetra Kazhagam in Tamil Nadu captured 64 per cent of the seats in the Tamil Nadu State Assembly (following a year of President's Rule). And immediately thereafter, they repeated the work of their colleagues in Andhra Pradesh. Five years later, in 1994, similar reforms were undertaken under similar political circumstances in Karnataka, where the Congress Party held 79 per cent of the existing state-level seats, as well as in Maharashtra.<sup>39</sup> (It is, however, important to concede that, strictly speaking, the state-level majority in Maharashtra following the State Assembly elections of March 1990 amounted to slightly less than 50 per cent.<sup>40</sup> Still, few would disagree that the ruling Congress Party recovered quite dramatically after India's general elections in June 1991, securing 77 per cent of Maharashtra's 48 Lok Sabha seats; in fact, substantial victories in subsequent local *panchayat* and municipal corporation elections ensured that Maharashtra's state-level Congress Party was in a much stronger position when Maharashtra finally introduced its own Hindu Succession Amendment during the summer of 1994.)

Indeed, even when it came to the politically sensitive subject of Muslim personal law, India's efforts to pursue the path of 'substantive' religious-cum-legal reform followed more or less exactly the same pattern.

In 1973, for instance, Prime Minister Indira Gandhi simply ignored a pattern of elite *ulema*-based resistance when, armed with a single-party Lok Sabha majority of 66 per cent, she opted to revise the existing Criminal Procedure Code (Section 125) in

<sup>38</sup> In June 1985, the Telugu Desam Party used its overwhelming majority to abolish Andhra's Congress-dominated upper house (a.k.a. the Legislative Council), and, two months later, it went on to pass a new Hindu Succession (Andhra Pradesh Amendment) Act.

<sup>39</sup> See, the Hindu Succession (Tamil Nadu Amendment) Act, 1989, the Hindu Succession (Karnataka Amendment) Act, 1994, and the Hindu Succession (Maharashtra Amendment) Act, 1994.

<sup>40</sup> After the March 1990 Maharashtra State Assembly elections, the Congress Party held a total of 141 out of 288 seats (49 per cent).

an effort to ensure that all female divorcees throughout India—Muslim and non-Muslim alike—would be governed by the same law of maintenance (notwithstanding the presence of an entirely separate and, some argued, a constitutionally ‘protected’ Muslim personal law of divorce).<sup>41</sup> Indeed, when this issue resurfaced more than ten years later following the infamous *Shah Bano* decision in 1985, Prime Minister Rajiv Gandhi simply built on his own single-party majority—an unprecedented 76 per cent—to reframe the substance of Muslim personal law itself: ‘Behold!’, noted the Indian Supreme Court in its review of the entirely new Muslim Women’s (Protection of Rights on Divorce) Act (1986) that emerged from this effort, Muslim divorcees would be entitled to receive a post-divorce allowance even beyond the traditional three-month period known as *iddat*.<sup>42</sup> And ‘Lo!’, this maintenance could be claimed from several

<sup>41</sup> Briefly stated, Indira Gandhi amended Section 125 of the revised Criminal Procedure Code to note that, for the purposes of claiming maintenance, the meaning of the word ‘wife’ should be taken to include both married and divorced wives. This did not introduce a change in terms of Muslim personal law per se, because, of course, the Criminal Procedure Code was a criminal law targeting all Indians without any special concern for their particular religious affiliations. But, even so, some Muslims objected on the basis that Muslim personal law contained its own (separate) provisions for the maintenance of divorced wives. Whereas Indira Gandhi sought to provide women (including divorced women) with a lifetime maintenance guarantee, for instance, some Muslims argued that in divorces initiated by husbands (known as ‘triple *talak*’), Muslim men were obligated to maintain their divorced wives for a period of roughly three months, three menstrual, or three lunar cycles—a period known as *iddat*—and no more. And, in divorces initiated by wives (*khula*), they noted that husbands were not obligated to pay any maintenance at all; instead, divorced wives were generally expected to return the money they (should have) received at the time of their marriage—a sum described as *mehr*. In short, a law requiring husbands to maintain their divorced wives in perpetuity—and that too with an amount specified by a criminal judge—was regarded as anathema to traditional interpretations of Muslim personal law. The Constitution itself, many argued, allowed for a certain freedom of religious expression (including the preservation of religious personal laws subject to various notions of ‘public order’ and ‘morality’), and, with this in mind, many insisted that Section 125 of the newly amended CrPC (1973) *should not apply to Muslims*. Still, Prime Minister Indira Gandhi simply built on the strength of her parliamentary majority, applying Section 125 to all citizens as a purely ‘humanitarian’ measure.

<sup>42</sup> In the case of *Mohammad Ahmed Khan v. Shah Bano*, (1985), 2 SCC 556, the Supreme Court noted that, as per Section 125 of the Criminal Procedure Code

different sources, including state-level *waqf* boards. And finally, 'Rejoice!' This provision was not limited to cases of *talaq* initiated by husbands. It applied to all divorces including so-called *khula* divorces initiated by Muslim wives.<sup>43</sup>

Of course, in the context of these reforms, Parashar noted that the government 'could have utilized...considerable scholarly opinion [noting] that it *is* possible and desirable to modify *some* aspects of...Islamic law *without* undermining [its] sacred nature' (emphasis added).<sup>44</sup> But, following in the footsteps of General Ayub Khan and his MFLO in Pakistan, the Supreme Court argued that Rajiv Gandhi did not bother. On the contrary, they noted that he simply responded to an appeal from local Muslims to clarify, in the context of *fresh legislation*, the 'substance' of Muslim personal law.<sup>45</sup>

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(1973), destitute Muslim divorcees were entitled to receive a maintenance allowance from their husbands even beyond the period known as *iddat*. In fact, the Court reiterated the fact that Section 125 had been amended as a 'humanitarian' measure set apart from the specific terms of Muslim personal law (although, having done so, the Court went on to explain that, even if Section 125 had attempted to address the terms of Muslim personal law, it would have remained fully in keeping with the spirit of *shari'ah*). Needless to say, this effort to redefine the spirit of *shari'ah* prompted an intense political backlash, particularly on the part of the *ulema*, and especially, the Muslim Personal Law Board based in Delhi. In fact, the strength of this backlash led Muslim League General Secretary G.M. Banatwala to sponsor the bill that ultimately led to the promulgation of the Muslim Women's (Protection of Rights on Divorce) Act (1986).

<sup>43</sup> The Muslim Women's (Protection of Rights on Divorce) Act intended to 'protect' the rights of divorced Muslim women within the terms of Muslim personal law. In particular, it sought to embrace a modified interpretation of Hanafi Sunni jurisprudence and having done so, it sought to apply this interpretation to *all* Muslims (both Sunni *and* Shi'a) across India. In fact, even within this modified interpretation the Act explained that destitute Muslim divorcees would be entitled to file a claim for maintenance, not only from their ex-husbands, but also (for the first time) from other relatives, including their parents and their brothers, as well as state-level *waqf* boards.

<sup>44</sup> Parashar, *Women and Family Law Reform in India*, p. 186.

<sup>45</sup> The Muslim Women's (Protection of Rights on Divorce) Act, 1986, effectively reconstructed the substance of Muslim personal law to provide, in Section 3(1)(a), protections for destitute women similar to those granted by the Supreme Court in its *Shah Bano* decision. In fact, the nature of these protections was clarified in the case of *Daniel Latifi v. Union of India* (2001) 7 SCC 740, which, in upholding the Muslim Women's Act, 1986, explained that divorced Muslim women still enjoyed access to a 'reasonable and fair' level of maintenance even after the post-divorce

Throughout postcolonial India, the terms of 'substantive' religious-cum-legal reform have rarely occurred without the protections afforded by a climate of overwhelming political power. The Hindu Marriage (Amendment) Act, 1964, was introduced when Prime Minister Jawaharlal Nehru and the Congress Party controlled 73 per cent of the Lok Sabha seats; the Marriage Laws (Amendment) Act, 1976, was promulgated during Prime Minister Indira Gandhi's Emergency; the Commission of *Sati* (Prevention) Act, 1987, was passed when Rajiv Gandhi enjoyed a single-party majority of 76 per cent; and so on<sup>46</sup> (see Table 7.1). In fact, the only exception to this basic rule so far involves the recent promulgation of a new Hindu Succession (Amendment) Act by the Congress-led United Progressive Alliance (UPA) coalition that emerged in 2004—a coalition in which the Congress Party controlled the smallest number of Lok Sabha seats (just 27 per cent) ever held by a postcolonial ruling party.

Building on the combined efforts of several different civil society organizations, as well as—and, perhaps, especially—prior state-level reforms, this new Act (2005) introduced fully equal 'ownership' rights for Hindu sons and daughters (while, at the same time, allowing both to serve as the 'manager' of joint Hindu property).<sup>47</sup> And remarkably, it did so within the context of an extremely fragile coalition government. In fact, for the first time ever, the Indian government seemed to address the task of 'substantive' religious-cum-legal reform as a matter of routine civil society engagement and (above all) fragile *coalition* politics.

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period known as *iddat*. In other words—owing to the rather innovative approach to maintenance enshrined in the Muslim Women's Act, 1986—women still enjoyed some access to a lifetime maintenance guarantee as outlined in Section 125 of the Criminal Procedure Code (1973).

<sup>46</sup> Parashar, *Women and Family Law Reform in India*, p. 272. The Marriage Laws (Amendment) Act, 1976, which provided additional grounds for the dissolution of marriage, such as divorce by 'mutual consent' and, somewhat later, Clause 21(a) in the Special Marriage (Amendment) Act, 1976 (according to which two Hindus married under this Act were made subject to the 'Hindu' Succession Act, 1956 rather than the 'Indian' Succession Act, 1925) were by far the most prominent examples. Indeed, the timing of these reforms in the context of Indira Gandhi's Emergency is telling.

<sup>47</sup> Some activists, such as Bina Agarwal, supported this change, even as they argued that the co-parcenary should have been abolished altogether. See, Bina Agarwal, 'Landmark Step to Gender Equality', *The Hindu*, 25 September 2005.

**Table 7.1** Leading Party: Share of Lok Sabha Seats  
(Government/Prime Minister)

<i>Year</i>	<i>Share of Lok Sabha Seats (%)</i>	<i>Leading Party</i>	<i>Government</i>	<i>Prime Minister</i>
1952*	74.4	Congress	Congress	Jawaharlal Nehru
1957*	75.1	Congress	Congress	Jawaharlal Nehru
1957*	75.1	Congress	Congress	Jawaharlal Nehru
1962*	73.1	Congress	Congress	Jawaharlal Nehru, Lal Bahadur Shastri
1967	54.4	Congress	Congress	Indira Gandhi
1971*	66.0	Congress	Congress	Indira Gandhi
<i>Emergency: 1975–7</i>				
1977	54.1	Janata Party	Janata Party	Morarji Desai, Charan Singh
1980*	66.7	Congress	Congress	Indira Gandhi
<i>Assassination of Indira Gandhi: October 1984</i>				
1984*	76.4	Congress	Congress	Rajiv Gandhi
1989	36.1	Congress	BJP- supported National Front	V.P. Singh, Chandra Shekhar
<i>Assassination of Rajiv Gandhi: March 1991</i>				
1991	44.8	Congress	Congress	P.V. Narasimha Rao
1996	29.5	BJP	Congress- supported United Front	H.D. Deve Gowda, I.K. Gujral

\*Government with single-party majority above 60 per cent promulgates substantive religious personal law reform.



1998	33.4	BJP	BJP-led National Democratic Alliance	Atal Bihari Vajpayee
1999	33.4	BJP	BJP-led National Democratic Alliance	Atal Bihari Vajpayee
2004**	26.7	Congress	Congress-led United Progressive Alliance	Manmohan Singh
2009	37.9	Congress	Congress-led United Progressive Alliance	Manmohan Singh

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\*\*Government with single-party majority below 60 per cent promulgates substantive religious personal law reform.

## CONCLUSION

The challenge, of course, lies in explaining why most coalition governments have felt themselves to be so much more thoroughly constrained than this initial UPA government in India (2004–9). Indeed, why is it that for so long, elected representatives have been so very subdued when faced with the prospect of *reforming* the religious-cum-legal landscape that surrounds them? Is the Hindu Succession (Amendment) Act, 2005, an *anomaly*? Or perhaps, as many reformers hope, an *arbiter* of future trends?

Clearly, specific ‘constitutional’ barriers are not sufficient to explain the inhibitions that I have highlighted in the context of this essay. On the contrary, neither India nor Pakistan harbours any relevant constitutional constraints. Neither harbours any special class of religious-cum-legal elites with any preemptive veto. And of course, as John H. Mansfield also stresses in his contribution to this volume, neither has attempted to erect a towering ‘wall of separation’ between religion, on the one hand, and the work of the legislature, on the other. In fact, from a purely ‘constitutional’ perspective, the most important question is really one regarding

what can only be described as an apparent *inhibition*, on the part of several ruling coalitions, to *engage* the legally permissive environment that surrounds them. Is political negotiation or bargaining in a non-authoritarian multi-party coalition somehow more difficult when it comes to negotiations involving 'religion'? And if so, why? *Why are 'religious' laws, democratically, so much more difficult to reform?*

Constitutionally, existing attachments to religious personal law do not constrain the reach of democratic legislatures. In fact, in this sense, even 'special status' constitutions that privilege certain religious traditions cannot be said to depart (automatically) from the specific terms of democracy. And of course, drawing special attention to the power of history—for example, colonial history—it is simply impossible to suggest that the legacy of the colonial State might be sufficient to explain specific patterns of 'reformist' variation over time—not only between countries (Pakistan v. India) but also within them (Pakistan 1948 v. 1961; India 1948 v. 1956; and so on). On the contrary, like so many factors that stretch across these variations, the power of 'colonialism' is a 'constant'.

Even if prevailing constitutional and colonial arrangements fail to explain these patterns of variation, however, specific political arrangements do not: India under Prime Ministers Jawaharlal Nehru and Rajiv Gandhi and Pakistan under Generals Ayub Khan and Zia-ul-Haq pursued major 'substantive' reforms; Prime Ministers Benazir Bhutto and Narasimha Rao did not. If, however, fragile coalition governments like those of Benazir Bhutto and Narasimha Rao represent an increasingly common feature of the existing political landscape in South Asia—and I would argue they do—the question arises: *what are the implications of this coalition-based political landscape for the underlying possibility of (ongoing) religious-cum-legal reform?* Indeed, how does a history of reform set apart from the terms of cross-party bargaining interact with, *or challenge*, the outlook for reform in South Asia's postcolonial 'democracies'? Is the Hindu Succession (Amendment) Act, 2005 *an anomaly or an arbiter of future trends?*

When a well-known *mullah* by the name of Ehtisham-ul-Haq Thanvi rejected Ayub Khan's push to provide a legal defence for the inheritance rights of orphaned grandchildren, noting that, 'as a matter of principle, reference to public opinion on purely shariat

questions amounts to trifling with...[the] shariat and ridiculing the religion',<sup>48</sup> he was not articulating the views of a lonely cleric. On the contrary, he was articulating an extremely widespread sense of political apprehension regarding the religious propriety of proactive religious-cum-legal reforms. He was, in fact, pushing back against the 'presumptuous' zeal of postcolonial reformers, articulating a popular attachment to the separation of religion, religious personal law, and modern 'democratic' politics.

When a Hindu Mahasabha member of India's Legislative Assembly asked, in 1955, 'what right...Prime Minister [Jawaharlal Nehru had] to initiate revolutionary bills which would shake the roots of Indian civilization shaped by a personal law which [had] stood the test of centuries', he was not articulating the views of a renegade Hindu 'extremist'.<sup>49</sup> He was, in fact, articulating a rather common pattern of formal (legal) hesitation—one that, at the time, reflected the views of his Congress Party colleague, the President of India, Rajendra Prasad.<sup>50</sup>

As David S. Powers noted, in 1998, in a special issue of *Islamic Law and Society* devoted to the Islamic law of inheritance, in 1998, it is essential to understand 'how Muslims have interpreted and, on occasion, reshaped and redefined the materials contained within the corpus of Islamic law'. In fact, he went out of his way to stress the extent to which Islamic law, 'like other legal systems', is 'a product of history'.<sup>51</sup> But the important question does not concern the power of history as such; rather, the most important question concerns the extent to which historically familiar processes of reinterpretation, redefinition, and reform have become so powerfully unfamiliar politically.<sup>52</sup> What are the implications of this political unfamiliarity for those with an interest in the relationship—indeed the special legal relationship—between 'religion' and 'democracy' today? Is it possible

<sup>48</sup> *Report of the Commission on Marriage and Family Laws* (Law Division, Government of Pakistan: Islamabad, 1963), p. 92.

<sup>49</sup> Som, 'Jawaharlal Nehru and the Hindu Code', p. 174.

<sup>50</sup> *Ibid.*, p. 182.

<sup>51</sup> See, David Powers, 'The Islamic Inheritance System', *Islamic Law and Society*, (1998), 5(3): 290.

<sup>52</sup> Richly historicized processes of religious re-interpretation are often paired with a deep reluctance to define these processes as religiously (or politically) 'legitimate'. Indeed, those who seek to promote such processes are often seen as heretics.

to imagine a situation in which the processes that Powers described as historically and religiously 'normal' are, in fact, also politically 'normal' and, hence, politically accessible to those with an interest in reiterative patterns of religious debate, political negotiation, and, ultimately, 'democratic' religious-cum-legal reform?

Scholars have not yet had a chance to examine the bargaining processes that preceded the promulgation of India's Hindu Succession (Amendment) Act, 2005.<sup>53</sup> But when they do, several questions will merit their attention. These questions will concern the ways in which those involved in this process of reform managed to articulate a coherent 'religious' justification for their efforts. Did they succeed in bringing the terms of 'politics' and 'religion' together? And if they did, how exactly did they manage it? Did their efforts unfold within a 'religious' language of 'religious-cum-political reform'? And if so, what did that language sound like?

These are the questions that my project has raised so far: What does this language sound like? Is such a language possible? And if so, what are its preconditions?

<sup>53</sup> For a legal assessment of this law, see the work of Indian Law Commission Chairman, Justice A.R. Lakshmanan, 'Proposal to amend the Hindu Succession Act, 1956, as amended by Act 39 of 2005' (5 February 2008). See also, Agarwal, 'Landmark Step to Gender Equality'.